

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 22 of the Commission's)	
Rules to Benefit the Consumers of)	
Air-Ground Telecommunications Services)	WT Docket No. 03-103
)	
Biennial Regulatory Review–Amendment)	
of Parts 1, 22, and 90 of the Commission's)	
Rules)	

To: The Commission

EX PARTE NOTICE

**AIRCELL, INC. RESPONSE TO COMMENTS
FILED BY SKYWAY AIRCRAFT, INC.**

AirCell, Inc. (“AirCell”) hereby responds to comments recently filed by Skyway Aircraft, Inc. (“Skyway”) in the above referenced proceeding. Skyway urges the Commission to retain the current regulatory structure of the 800 MHz air-to-ground (“ATG”) band and to rely on Skyway to revitalize this band with new high-speed data services and to provide much-needed competition to Verizon Airfone. AirCell opposes Skyway’s request to freeze the structure of the 800 MHz ATG band and urges the Commission to be very careful before relying on Skyway to develop high-speed services under the current structure of the 800 MHz ATG band. Instead, AirCell asks the Commission to facilitate a truly competitive ATG system that will enable deployment of new and innovative next-generation technologies.

The Commission's proceeding to review the rules for the 800 MHz ATG band has been underway for almost one year and numerous comments have been submitted. Until the filing by Skyway, every commenter - including all those companies currently operating an air-to-ground network and serving actual customers - has agreed that the 800 MHz ATG band should be retained for air-to-ground services, but reconfigured to permit new technologies and high-speed data services. The common thread throughout the comments other than those of Skyway is an acknowledgement that some form of CDMA is the most appropriate technology for the band. No commenter other than Skyway believes that broadband ATG services can be provided to the flying public utilizing rigid 6 kHz channels within the 800 MHz ATG band.

Skyway says it has purchased its ATG technology and equipment from AT&T Wireless's now defunct Claircom ATG subsidiary and that Skyway will reconstitute the Claircom network and provide broadband ATG communications services. Skyway has published numerous statements, particularly in its filings with the Securities and Exchange Commission ("SEC"), announcing Skyway's intention to provide broadband ATG services at the rate of 15 mbps over the currently mandated 6 kHz channels. This would be a rate of transmission that no other commenter in this docket can even come close to offering, including Verizon Airfone, Boeing, and AirCell, whose collective financial and engineering resources dwarf those available to Skyway (which reported quarterly sales of only \$15,000 in its most recent SEC filing, with cash to fund operations for only the next five months). In fact, the incumbent

service provider, Verizon Airfone, currently is providing service at only a 9600 kbps rate – a tiny fraction of the 15 mbps rate which Skyway says it will provide. The Commission should consider carefully whether Skyway has any realistic prospect of providing broadband service at this rate in the current 6 kHz channels before taking seriously any claim that Skyway can itself revitalize the band and provide the much-needed competition that can end Verizon Airfone’s current ATG monopoly.

By way of background, on November 24, 2003, Skyway filed a request for a Special Temporary Authority (“STA”) to begin rebuilding the old Claircom network. The FCC granted the STA with the explicit warning that the STA was limited to a six-month term, that it could be terminated without a hearing, that the STA did not vest any right to operate or use the frequencies beyond the six-month term, and that the STA was further conditioned on Skyway’s being subject to all actions the Commission may take in the above-referenced docket, including “the possible re-allocation of the air-ground band . . . and/or adoption of rules establishing a revised licensing structure and procedures for the commercial air-ground service.”

As of this date, Skyway has made no effort to seek a regular license under the existing rules for the 800 MHz ATG service. Skyway has not petitioned the FCC to open a new license application window. Skyway seems to believe that it acquired an ATG license from AT&T Wireless’s Claircom subsidiary when it bought the intellectual property and equipment, but Skyway itself said in its attachment to its original August 1, 2003 filing that “[d]uring

the process of purchasing the Claircom network and equipment Claircom surrendered their license.” As acknowledged in Skyway’s own statement, it has no license to operate in the ATG band beyond the six-month temporary permit.

Our review of numerous recent public press releases and financial statements, including its most recent 10-QSP filing with the SEC, shows that Skyway has made no mention of the temporary status of its operating authority or that the above-referenced ongoing proceeding may change the regulatory structure of the ATG band to Skyway’s detriment. As it currently stands, Skyway’s STA expires on June 2, 2004. Under Commission rules for STAs, extensions can be granted only in “extraordinary circumstances,” and only for an additional six-month period. 1

The Commission has already made it clear that Skyway’s right to operate is limited to the temporary period set forth in its STA and that Skyway is taking its own risk – and that of its shareholders - that it will have any right to operate beyond the expiration date of June 2, 2004 – which is less than two months from the date of these comments. In addition, given the extent of the claims made by Skyway to be able to provide broadband ATG service, the Commission should ask Skyway how much of the Claircom network Skyway has re-constructed and put in operation and to confirm – with scientific evidence - that Skyway is transmitting 15 mbps through the 6 kHz channels. Given the limited ATG spectrum available, AirCell encourages the Commission

1 47 C.F.R. § 1.93 (a)(3)

to proceed carefully in this proceeding and require all commenters to support their technical claims with appropriate data and evidence.

Respectfully submitted,

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